stay the action as being an abuse of the process of the court. We unfortunately, differ from the learned judge and agree with the master. We think it is not made out that these proceedings ought to be stayed, although of course we indicate no possible sort of view as to what is likely to be, or ought to be, the result of the action when it is heard. The only question before us is whether we think the action ought to be heard."

Counsel for the respondents concedes that a fresh action can be brought to set aside a final judgment in a previous action, and that a consent judgment may be set aside on the grounds of mistake and fraud, but he has argued that the delay on the part of the appellant in bringing his present action to set aside the judgment against him is fatal. I do not think I can accept that argument for two reasons. First, there would appear to be a reasonable explanation for the delay. Secondly, the plaintiff must be given an opportunity to explain the delay at the trial of the action. As I have already said, it is not open to the court to go into the merits of the case at this stage. It is further argued that the court is entitled at this stage to look into the whole background of the litigation. I do no agree. A point is also made that there is no evidence in support of the plaintiff's claim except for his bare allegation. That, to my mind, is the strongest ground for allowing the appeal, because the evidence can only be produced at the trial of the action.

As was said by Fletcher Moulton L.J. in *Dyson* v. *Attorney-General:*[10]

"Differences of law, just as differences of fact, are normally to be decided by trial after hearing in court, and not to be refused a hearing in court by an order of the judge in chambers."

I would, therefore, allow this appeal with costs both here and in the court below and set aside the order appealed from.

**Ismail Khan C.J. (Borneo)** and **Pawan Ahmad J.** concurred.

*Appeal allowed.*

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## KONG KIM SHING v. PUBLIC PROSECUTOR

**[F.C. (Ismail Khan C.J. (Borneo), Gill F.J. and Pawan Ahmad J.) December 5, 1972]**

**[Kuching — Federal Court Criminal Appeal No. 12 of 1972]**

*Internal Security — Proclamation of security area — Whether ultra vires.*

*Criminal trial — Emergency (Criminal Trials) Regulations, 1964, reg. 4 — Trial by a judge sitting alone — Whether ultra vires Emergency (Essential Powers) Act, 1964 or art. 8(1) of Federal Constitution — Internal Security Act, 1960.*

This was an appeal against the conviction of the appellant for the offences of carrying a firearm and being in control of cartridges in a security area, an offence under the Internal Security Act, 1960. The appellant was tried before a judge sitting alone and found guilty. On the appeal it was argued (a) that the proclamation of the security area was *ultra vires* section 47 of the Internal Security Act as it was made in respect of the whole of the Federation; (b) that the Emergency (Criminal Trials) Regulations, regulation 4, under which the appellant was tried and convicted was *ultra vires* the Emergency (Essential Powers) Act, 1964 and/or article 8(1) of the Federal Constitution.

**Held:** (1) even if the proclamation is to be regarded as applying to the whole Federation, it was not *ultra vires* the Internal Security Act 1960;

(2) the Emergency (Criminal Trials) Regulations (regs. 4 and 5) are not *ultra vires* section 2(2)(d) of the Emergency (Essential Powers) Act, 1964 or of article 8(1) of the Federal Constitution.

*Cases referred to:-*

(1) *Maebeth* v. *Ashley* 1 Rettie H.L. 14 at p. 16-20.

(2) *The Zamora* [1916] A.C. 77 at p. 107.

(3) *Mohamed Sidin* v. *Public Prosecutor* [1967] 1 M.L.J. 106.

(4) *Osman & Anor.* v. *Public Prosecutor* [1968] 2 M.L.J. 137.

FEDERAL COURT.

*C. T. Wong* for the appellant.

*Mohamed Jemuri bin Serjan* (Asst. State Attorney-General) for the respondent.

**Ismail Khan C.J. (Borneo):** We dismissed the appeal and indicated that we would give our reasons. We now give our reasons for dismissing the appeal.

The accused was charged in the High Court at Sibu as follows:

*First:*

"That you on 13th June, 1971, at about 8.00 p.m. or thereabout in a security area as proclaimed by the Yang di-Pertuan Agong by Federal L.N. 273 dated 7th September, 1964, and by Sarawak L.N.(F) 162 dated 11th September, 1964, namely at Bukit Asek Road, Sibu, in the Third Division, Sarawak, without lawful excuse carried a firearm, to wit, a home-made shotgun, without lawful authority therefor and you have thereby committed an offence punishable under section 57(1)(a) of the Internal Security Act, 1960".

*And Secondly:*

"That you on 13th June, 1971, at about 8.00 p.m. or thereabout in a security area as proclaimed by the Yang di-Pertuan Agong by Federal L.N. 273 dated 7th September, 1964, and by Sarawak L.N.(F) 162 dated 11th September, 1964, namely at Bukit Asek Road, Sibu, in the Third Division, Sarawak, without lawful excuse had under your control 4 rounds of live cartridges without lawful authority therefor and that you have thereby committed an offence punishable under section 57(1)(b) of the Internal Security Act, 1960".

The facts of the case, briefly, are as follows. At about 8.00 p.m. on the 13th June, 1971, five members of the Field Force were carrying out checking and patrol duties at Bukit Asek Road, Sibu, Sarawak. Bukit Asek Road was a security area. The accused was seen cycling from Bukit Asek Road in the direction of the town, and carrying a green plastic bag. On being challenged, he dropped the cycle and the bag and ran back to Bukit Asek Road. One of the constables gave chase and caught up with him. The plastic bag was found to contain a home-made gun, four live cartridges and a plastic water-bottle. The gun was capable of discharging pellets from one of the cartridges.

At the close of the case for the prosecution the accused was called for his defence. The defence was merely a denial that he carried the home-made gun and ammunition. He admitted having passed the soldiers but said that one of them caught hold of the handlebar of his cycle and he was pushed into a drain. He ran away as he was afraid of soldiers. At the police station he was shown a gun and was told that it belongd to him which he denied. In short, the defence was that the gun and the ammunition were planted on him.

The judge disbelieved the evidence. He held there was no rebuttal and convicted the accused and sentenced him to death. He appealed against his conviction.

Bukit Asek Road, Sibu, where the offence was committed is in the Third Division, Sarawak. Sarawak was declared a security area by a proclamation L.N. 273/64 (hereinafter caled the Proclamation) made by His Majesty the Yang di-Pertuan Agong on the 5th September, 1964 and published on the 7th September, 1964. It declared all areas in the Federation security areas (other than those already declared to be security areas by two previous proclamations, one issued on the 11th day of August, 1964 (hereinafter called the first proclamation) and the other (hereinafter called the second proclamation) on the 17th day of August, 1964.

The Proclamation was extended to the Borneo States of Sabah and Sarawak by L.N. 232/63. It was republished in Sarawak in L.N. (F) 162 on the 11th September, 1964.

By the first proclamation the whole of the territorial waters of the States of Malaya and Singapore (at the time part of the Federation) and areas on land along the coasts of the States of Malaya and Singapore within a distance of two miles landward from the low watermark were declared to be security areas. By the second proclamation the areas comprising the territories in the States of Johore, Malacca and Negri Sembilan were proclaimed security areas.

In this appeal the appellant attacked the Proclamation as being *ultra vires* section 47 subsections (1) and (2) of the Internal Security Act, 1960 (hereinafter called the section) which reads:

"47. (1) If in the opinion of the Yang di-Pertuan Agong public security in any area in the Federation is seriously disturbed or threatened by reason of any action taken or threatened by any substantial body of persons, whether inside or outside the Federation, to cause or to cause a substantial number of citizens to fear organised violence against persons or property, he may, if he considers it to be necessary for the purpose of suppressing such organised violence, proclaim such area as a security area for the purpose of this Part.

(2) Every proclamation made under sub-section (1) shall apply only to such area as is therein specified and shall remain in force until it is revoked by the Yang di-Pertuan Agong or is annulled by resolutions passed by both Houses of Parliament:

Provided that such revocation or annulment shall be without prejudice to anything previously done by virtue of the proclamation.

...."

It was contended by counsel for the appellant that a proclamation under the section could only be made in respect of a particular area in the Federation but not the area comprising the whole Federation. It was further submitted that such an area, a particular part of the Federation could be declared a security area as and when a disturbance or a threat of such disturbance arises therein. There is no power, it was said, to declare in one proclamation the area comprising the whole Federation as security area. We pause to observe that the Proclamation did not declare the whole of the Federation a security area but only those not covered by the first and second proclamations.

However, even if the Proclamation is to be regarded as applying to the whole Federation, we do not agree that it is *ultra vires*. The word "area" is nowhere defined in the Internal Security Act, 1960, and in our view the word could mean a particular area in the Federation or the whole area thereof.

Counsel referred to the case of *Macbeth* v. *Ashley*.[1] That case decided that the justices authorised to fix closing hours of licensed houses in a particular locality within a burgh acted *ultra vires* in fixing closing hours of houses in the whole of the burgh. We cannot see how a case relating to the powers of justices in respect of the closing hours of licensed houses could be relevant to a consideration of the powers of His Majesty the Yang di-Pertuan Agong to issue a proclamation in an emergency in the interest of the security of the State. The disturbance contemplated in the section is not just an ordinary breach of public order. It is one which disrupts the normal life of the people as well as internal security. An emergency demands extraordinary measures capable of being applied promptly to any part of a territory or the whole of the territory. What has to be done in such an emergency is a matter for His Majesty the Yang di-Pertuan Agong who should know the requirements of the situation and the effect of compulsive factors which operate in a grave crisis. As Lord Parker of Waddington said in the case of *The Zamora*[2] "those who are responsible for the national security must be the sole judges of what the national security requires."

Counsel's interpretation of the word "area" to mean only a particular part of the Federation would lead to the anomalous result that in the face of a sudden emergency threatening the security of the whole Federation there would have to be, instead of one, several proclamations covering different parts of the country which in the aggregate make up the whole of the Federation before the Federation could be declared a security area. The objection fails.

It was next objected that the Emergency (Criminal Trials) Regulations, 1964 (regulation 4) under which the appellant was tried is *ultra vires* the Emergency (Essential Powers) Act, 1964 and/or Article 8(1) of the Constitution. Regulation 4 provides for a trial by a judge sitting alone.

We can dispose of this objection by referring to two cases (1) Federal Court case *Mohamed Sidin* v. *Public Prosecutor*[3] and (2) Privy Council case *Osman & anor.* v. *Public Prosecutor*.[4] These cases decided that the Emergency Regulations (Regulations 4 and 5) are not *ultra vires* section 2(2)(d) of the Emergency (Essential Powers) Act, 1964 or of Article 8(1) of the Constitution.

The other grounds of appeal are devoid of any merit.

*Appeal dismissed.*